

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027  
(Filed February 28, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING  
REGARDING APPLICANTS' MOTION TO COMPEL  
RESPONSES FROM QWEST**

This ruling resolves the Motion filed on June 24, 2005, by SBC Communications Inc. ("SBC") and AT&T Corporation ("AT&T") (collectively, "Applicants") to compel responses by Qwest Communications Corporation ("Qwest") to Applicants' first set of data requests. In support of its Motion, Applicants attached the Declaration of Ryan Takemoto. Qwest filed a response in opposition to the Motion on June 29, 2005. Qwest attached in support of its opposition the Declaration of Thomas J. MacBride, Jr. Applicants filed a third-round reply on June 30, 2005.

## **Position of Applicants**

Applicants seeks to compel responses from Qwest as follows:

- (i) Qwest's business plans and marketing plans from the past two years that relate or pertain in any way to Qwest's facilities or services in California, including all business and marketing plans developed after the announcement of the SBC/MCI merger;
- (ii) All non-privileged documents that analyze, discuss or reflect communications about the proposed SBC/ATT merger on Qwest's offering of services in California or on telecommunication services end-users in California
- (iii) Full and complete responses to Data Requests 1-23, 1-24, 1-25, 1-26, which seek information and documents relating to Qwest's assertions in its protest filed in this proceeding.
- (iv) All non-privileged workpapers used in drafting, or that support, Qwest's protest filed in this proceeding.
- (v) Full and complete responses to Data Requests 1-3, 1-13, 1-15 and 1-17, which seek information (including documents) regarding Qwest's facilities and services in California.

Applicants claim that Qwest's responses to Applicants' above-referenced data requests were evasive, non-responsive, and incomplete.<sup>1</sup>

In its response, Qwest argues that the Motion is premature because Applicants first failed to meet and confer with Qwest as called for in Resolution ALJ-164. Qwest argues that Applicants should first be required to meet and

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<sup>1</sup> In response to Data Request 1-24, subpart (d), Qwest refers to "Highly Confidential Attachments 'A' and 'B'." However, Applicants report that no such attachments were provided with the response.

confer with Qwest to attempt to resolve the discovery disputes before obtaining any ruling on the merits. Qwest also presents general objections to various of the data requests at issue in Applicants' motion. Qwest objects to several of them on the basis that they are overly broad and unduly burdensome, and not calculated to lead to discovery of admissible evidence. Qwest claims that Applicants have not explained how or why Qwest's responses that were provided are deficient.

Applicants do not deny that they declined to convene a meet-and-confer session prior to following their motion, but argue that any effort to meet and confer is "futile" because of what it characterizes as Qwest's "stonewall positions." Applicants also argue that in bypassing the meet-and-confer step, they avoided interfering with Qwest's production of its own testimony. Applicants criticize Qwest for not making any commitment to produce the types of marketing and business planning documents that this Commission has required participating competitors to produce in prior proceedings of this nature.

### **Discussion**

Although ideally, parties should have engaged in a meet and confer session before this ruling was brought, the fact is that parties did not. Yet, in the interests of resolving this matter in the most expeditious manner, this ruling shall address the substantive merits of parties' disputes. Parties' disputes do not contain sufficient detail to order specific documents to be produced. Yet, general principles are set forth to guide parties in further resolving these discovery disputes. As directed below, parties are still directed to meet and confer to work, as necessary out the specific details of particular data to be produced pursuant to the guidelines and principles articulated in this ruling.

### **Qwest's Business Plans and Marketing Plans**

Applicants propounded ten data requests seeking business planning documents from Qwest. These requests sought Qwest's business and marketing plans from before and after announcement of the SBC/ATT merger and any business plans pertaining to any effect of the SBC/ATT merger. The specific questions at issue in Applicants' motion relating to business and marketing plans are as follows:

<b><u>Data Request</u></b>	<b><u>Text of Request</u></b>
1-2	Please produce strategic business planning documents from the last two years that reflect QWEST's offering of communications services in California.
1-4	Please indicate whether QWEST currently provides service to residential customers in California. If so, please produce business plans and financial results from the last two years relating to such service.
1-5	Please indicate whether QWEST has any plans to serve residential customers in California. If so, please produce all business planning documents relating to such plans.
1-7	Please produce all marketing plans developed by QWEST after the public announcement of the SBC/ATT merger on January 31, 2005.
1-8	Please produce any business planning documents, projections or other analysis pertaining to any anticipated reduction in the number of business lines and/or customers served by QWEST in California as a result of the SBC/ATT merger.
1-9	Please produce all planning documents, projections or other analysis pertaining to any increase in the number of business lines and/or customers served by QWEST in California as a result of the SBC/ATT merger.
1-10	Please produce all planning documents, projections or other analysis pertaining to any expected change in revenue or cost to QWEST in California as a result of the SBC/ATT merger.
1-11	Please produce all planning documents, projections or other analysis pertaining to any change in the strategic plans of

	QWEST as a result of the SBC/ATT merger.
1-14	Please produce all planning documents, projections or other analysis pertaining to plans by QWEST to deploy additional facilities in California.
1-22	On March 30, 2005, a Denver Post article entitled “‘Plan B’: Picking up the pieces” states that QWEST has plans to purchase any assets that are divested as part of the approval of the SBC/ATT merger. Please produce all documents which relate to plans by QWEST to purchase any assets that are divested as part of the approval of the SBC/ATT merger.

Applicants claim that Qwest evaded these requests by not producing any business or marketing plan documents. For example, in response to Data Request 1-7, which asks for “all marketing plans developed by Qwest after the public announcement of the SBC/ATT merger on January 31, 2005,” Qwest responded that “this request purports to seek plans that are affected by the proposed merger, the eventuality of which has not yet been determined.” Applicants respond that it is irrelevant whether the merger closes, and that Applicants are entitled to evaluate whether Qwest’s business plans reflect any anticipated impairment as a result of the merger, or whether Qwest expects to flourish.

Applicants argue that Qwest’s business planning documents and marketing plans relating to the SBC/ATT merger and Qwest’s provision of services in California are within the scope of relevant discovery. But Qwest has refused to provide business planning documents, marketing plans or projections relating to its business in California or the proposed SBC/ATT merger. Applicants argue that the Commission has affirmed, in similar proceedings, the relevance of protesting competitors’ planning and marketing documents, and the

right of applicants to obtain such documents to test competitors' claims regarding the effect of a merger on competition.

Applicants argue that any analysis that Qwest has performed or any non-privileged documents in Qwest's possession regarding the effects of the proposed merger are relevant to this proceeding because Qwest has asserted that the merger is anticompetitive. As such, Applicants claim they are entitled to any documents or information that Qwest possesses that discuss or analyze the proposed merger. (*See* Takemoto Decl. Ex. A (Data Requests 1-6 and 1-21.) Qwest contends there are "obvious anticompetitive implications of [the] merger" and that Qwest is "a future competitor to a potential SBC/AT&T combination." (Protest of Qwest Communications Corporation, filed April 14, 2005, pp. 5, 8). Applicants argue, therefore, that Qwest should be required to produce its business planning documents and marketing plans, which bear directly on Qwest's assertions.

Qwest responds that it has not located any California-specific strategic or business plans that anticipate or project the outcome of the proposed merger transaction. Qwest further argues that anything that it might generate in anticipation of the merger that fall short of describing anything that Qwest might implement would not be responsive to Applicants' request for "strategic business documents." Correspondingly, Qwest argues that it cannot develop any concrete plans for a post-merger world because no one knows at this point the form of such a world, including what conditions may be placed on approval of the proposed acquisition.

## **Discussion**

Qwest interprets the scope of these data requests more narrowly than can be reasonably inferred from the text of Applicants' questions. The requests are

not limited to “California-specific” business plans. Likewise, the data requests do not call upon Qwest to engage in speculation as to whether or on what terms the proposed merger may be approved. The data requests simply ask for business plans that relate to the merger.

Even though Qwest does not know with certainty the outcome of the merger proceeding, or what conditions may be placed on any approval of the merger, that does not necessarily mean that Qwest has prepared no business plans that may make certain assumptions predicated on whether, or on what basis, the SBC-AT&T acquisition may be approved. The fact that a particular Qwest business plan is not specifically labeled “California-specific” does not mean necessarily that such a plan would have no relevance to Qwest’s operations within California. Likewise, the fact that Qwest has developed no “concrete plans” in response to the proposed merger does not mean it has not developed any analysis of potential impacts or responses to different possible post-merger scenarios. Thus, Qwest is not excused from providing such potential business plans as are responsive to Applicants data requests even though such plans are not cast in “concrete.”

Although the data requests specifically asked for business planning documents, Qwest did not provide any actual documents, but instead provided only brief statements concerning the sort of business services it offered. To that extent, Qwest’s responses are deficient by failing to provide any actual documents within the scope of the data requests that are relevant to the merger proceeding.

On the other hand, while Qwest interprets the data requests too narrowly by refusing to provide any documents at all, the Applicants frame their Data Request 1-2, 1-4, and 1-5 too broadly by simply asking for “strategic business

documents” or “all business planning documents” without attempting to define the scope in a more focused manner, or specifically relating the business plans to the effects of the planned merger. Moreover, these requests appear somewhat duplicative and/or overlapping with Data Request 1-14 which asks for all planning documents, etc. that are a result of the SBC/AT&T merger. Thus, Qwest should not be required to respond to such duplicative questions. Applicants should narrow and eliminate these overlapping or duplicative questions.

By contrast, the subsequent data requests do attempt to reference the effects of the planned merger as a context for limiting the scope of response. Qwest is directed to produce relevant documents responsive to these data requests. Thus, parties are directed to meet and confer to reach agreement on production of specific documents that are specifically related to these data requests consistent with the principles articulated in this ruling.

Qwest objects to responding to Data Requests 1-8 and 1-9 regarding anticipated reduction in business lines or customers served by Qwest as a result of the merger. Qwest objects, claiming that the burden is not on Qwest to show the changes in its business as a result of the merger, but that the burden is on the Applicants to show that the merger is in the public interest. Qwest is correct that the burden is on the Applicants to show the merger is in the public interest, but in doing so, Applicants are entitled to conduct discovery concerning contrary claims by intervenors. Applicants’ burden does not relieve Qwest of its own independent obligation to respond to Applicants’ requests seeking the basis for Qwest’s claims that competition will be adversely affected by the merger. Accordingly, Qwest’s objections to those questions do not provide a valid basis to excuse Qwest from responding.



On the other hand, Qwest claims that SBC has categorically refused to answer similar, if not identical, data requests relating to business plans when Qwest posed them. Qwest indicates that those refusals have not yet come before the ALJ in a motion to compel because of the time required to go through the meet-and-confer process. Without knowing the substance of the requests claimed by Qwest to be similar in nature, it is not possible to assess the extent of any comparability between the two sets of requests. Nonetheless, in principle, the same general standards and scope of response for similar sorts of questions should apply on consistent basis both to Applicants and to competitors. To the extent that SBC objects to the scope of Qwest's data requests, it would be unfair to grant it access to similar sorts of information sought from Qwest. Similarly, the processes that have been applied concerning the treatment of Applicants' commercially sensitive data provided to parties should similarly apply to competitors' commercially sensitive data provided to Applicants. Thus, the nature and extent of Qwest documents that are produced as being responsive to Applicants data requests should be circumscribed by the similar standards to which parties agree concerning the nature and extend of Applicants' documents that are produced as responsive to Qwest data requests.

**Documents Regarding Effects of the Proposed SBC/ATT Merger on Qwest's Offering of Services**

Applicants also claim that Qwest refused to provide "documents that analyze or discuss the effect of the SBC/ATT merger on telecommunications services end-users in California or any part of California." (*Id.*, Exs. A, B (Data Requests 1-6 and 1-21 and responses thereto)).

Qwest has not provided a convincing rationale as to why it should not be required to produce a response to these data requests to the extent that it

possesses responsive documents. Accordingly, Qwest is directed to provide a response to these questions.

**Information and Documents Relating to  
Qwest's Assertions in its Protest**

Applicants claim that Qwest should also be compelled to provide information or documents directly related to assertions made in Qwest's protest. (*Id.*, Ex. A. (Data Requests 1-1, 1-23, 1-24, 1-25 and 1-26.) Qwest states that beyond those materials that are otherwise protected by attorney-client privilege and work product doctrine, Qwest has no documents that would be responsive to this request. Qwest argues that it is the Applicants—not Qwest or other protestants—that hold the details concerning their networks and market share. Qwest indicates that it has served data requests to SBC and AT&T to confirm its understanding of Applicants' networks and market share data.

Qwest's comments are taken to mean that it does not possess independent information—other than that subject to attorney-client privilege and work product protections—that is responsive to this group of data requests beyond any responses to the data requests that Qwest has propounded to Applicants. To the extent this understanding is not the case, and Qwest does, in fact, possess independent non-privileged data or materials which are responsive to these data requests, Qwest is directed to produce those independent data and materials to Applicants. Otherwise, based upon Qwest's representations, there appears to be nothing more to compel Qwest to produce in response to this group of data requests.

**Responses to Data Requests 1-3, 1-13, 1-15 and 1-17, Which Seek Information Regarding Qwest's Facilities and Services in California.**

Applicants claim that Qwest failed to respond adequately to data requests seeking information regarding Qwest's services and facilities in California. (*Id.*, Exs. A, B (Data Requests 1-3, 1-13, 1-15, 1-17 and responses thereto.)

Qwest has not provided a convincing rationale as to why it should not be required to produce a response to data requests to the extent that it possesses responsive documents. Accordingly, Qwest is directed to provide a response.

**"No Copies" Documents to be Produced in San Francisco.**

Applicants argue that any documents designated as "No Copies" produced by Qwest in this proceeding, including any documents whose production should be compelled by this motion, should be produced in San Francisco. Applicants raise this issue because Qwest's Non-disclosure and Protective Agreement specifies that "No Copies" documents will be produced only in Denver, Colorado.

In its response, Qwest states that it is willing to provide for "no copies" documents to be produced for viewing in San Francisco. Accordingly, the dispute over this issue is moot.

**IT IS RULED** that:

1. The Applicants' Motion to Compel is granted in part and denied in part as set forth below.
2. Parties shall promptly enter into meet and confer sessions as necessary to resolve specific details concerning materials to be produced pursuant to the directives set forth in this ruling as discussed above.
3. Qwest Communications Corporation (Qwest) shall be required to produce relevant documents that are responsive to Applicants' requests for business

plans marketing plans from the past two years that relate or pertain to Qwest's facilities or services in California, including business and marketing plans developed after the announcement of the SBC/MCI merger. Applicants, however, should narrow their requests to eliminate duplicative questions and limit requests to the specific effects of the proposed merger, as discussed above.

4. To the extent that Qwest does, in fact, possess independent data and materials which are responsive to Data Requests relating to claims made in its protest, Qwest is directed to produce those independent data and materials to Applicants. Otherwise, to the extent that Qwest does not possess independent information—other than that subject to attorney-client privilege and work product protections-- that is responsive to these data requests, there is nothing more to require them to produce in response to subject Data Requests.

5. Qwest shall produce full and complete responses to Data Requests 1-23, 1-24, 1-25, 1-26, which seek information and documents relating to Qwest's assertions in its protest filed in this proceeding.

6. Qwest shall produce full and complete responses to Data Requests 1-3, 1-13, 1-15 and 1-17, which seek information (including documents) regarding Qwest's facilities and services in California.

7. Since Qwest states that it is willing to provide for "no copies" documents to be produced for viewing in San Francisco, that portion of the Motion is moot.

Dated July 5, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Applicants' Motion to Compel Responses From Qwest on all parties of record in this proceeding or their attorneys of record.

Dated July 5, 2005, at San Francisco, California.

/s/ FANNIE SID

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Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.